

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

THE ASSUMPTION VILLAGE

Employer

and

Case No. 8-UC-347

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 627 a/w
SERVICE EMPLOYEES INTERNATIONAL UNION**

Petitioner

DECISION AND ORDER

Upon a petition filed under Section 9(b) of the National Labor Relations Act, hereafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereafter referred to as the Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,¹ the undersigned finds:

1. The Employer, a not-for-profit corporation, operates a nursing home and assisted living center, the Marian Center, in North Lima, Ohio. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization within the meaning of the Act that claims to represent certain employees of the Employer.

¹ The Employer and the Petitioner filed post-Hearing briefs which have been duly considered.

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act, for the following reasons:

The Petitioner seeks to clarify the existing collective bargaining unit in its contract with the Employer to include five LPNs, employed at the Marian Living Center in the job classification of night or afternoon supervisor. The Petitioner also contends that its petition is timely filed and that such LPNs employed at the Marian Living Center are not supervisors within the meaning of Section 2(11) of Act. Accordingly, the Petitioner asserts that the LPNs employed at the Marian Living Center are appropriate for inclusion within the existing bargaining unit.

The Employer asserts that the LPN positions at issue were in existence prior to the execution of the parties' current collective-bargaining agreement and that the parties agreed to the exclusion of such positions from the bargaining unit during the negotiations for that agreement. Accordingly, the Employer contends that the Board is precluded from including classifications of employees which have been historically excluded from the unit. In addition, the Employer contends that the LPNs at issue should be excluded from the unit because they hold the job classifications of afternoon and night supervisors and are statutory supervisors as defined by the Act.

As noted above, the Employer's facility is comprised of two operations consisting of a nursing home and an assisted living center, the Marian Living Center. The Marian Living Center, which opened in June 1998, is an addition to the existing nursing home facility and consists of forty-eight individual unfurnished apartments with capacity for sixty residents.

The Employer's Marian Living Center employs a manager for assisted living who oversees operations at the assisted living center, several receptionists, a recreation supervisor, an activities supervisor, five full and part-time afternoon and night supervisors, six to eight full and part-time resident associates, five to seven dietary aides/food service workers, and two housekeepers. Additionally, the Employer employs a campus administrator, a human resources manager, an assistant to the human resources manager, a supervisor for environmental services, a maintenance supervisor and a dietary manager, all of whom have responsibilities at both the nursing home and the assisted living center. On occasion, dietary aides employed at the Marian Living Center will work at the nursing home facility on an as-needed basis.

The Marian Living Center operates three work shifts providing twenty-four hour care to its residents. On the afternoon shift from 4:00 p.m. to midnight, the Employer assigns an LPN afternoon supervisor and a resident associate for the full shift and a receptionist and two dietary aide/food service workers for part of the shift. No other supervisory or management personnel beyond the shift supervisor are assigned in the Marian Living Center for the afternoon shift. On the night shift from midnight to 8:00 a.m., the Employer assigns an LPN night supervisor and a resident associate for the full shift and dietary aide for part of the shift. Similarly, there are no other supervisory or management personnel beyond the shift supervisor present on the night shift.

The campus administrator possesses overall responsibility for the operations for both the nursing home and the Center. The manager for assisted living oversees management of the Center and is responsible for supervising the staff on the day shift.

The afternoon and night supervisors oversee the reduced staff on the afternoon and night shifts.

The Petitioner is the certified bargaining representative for the bargaining unit employees and has a long standing bargaining relationship with the Employer which has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from October 1, 1998 through September 30, 2001. Article 2 of the parties' collective-bargaining agreement, which recognizes the Petitioner as the sole and exclusive collective bargaining representative for bargaining unit employees employed at the Employer's nursing home and Marian Living Center, provides:

The Employer recognizes the Union during the term of this Agreement as the sole and exclusive representative of employees in the bargaining unit of the Employer employed at its nursing home located at 9800 Market Street, North Lima, Ohio, for purposes of collective bargaining with respect to rates of pay, hours of employment, and other conditions of employment for all employees in the bargaining unit as defined by the National Labor Relations Board in its decision dated July 9, 1975 in case No. 8-RC-9995, said employees, more specifically described as Nursing Aides, Housekeeping staff, Dietary Workers including Cooks, Maintenance, Activities Coordinator, Maintenance Technician, Resident Associate, Rehabilitative Aides, and Laundry employees, as Case No. 8-RC-9969, more specifically described as LPN's. (sic) Notwithstanding this section, LPN's hired as Resident Care Coordinators shall be deemed supervisors and shall not be included in the bargaining unit.

The record reveals that in March 1998, the Employer's Human Resources Manager Robert Hlebak met with Local Union President Bill Padisak to discuss staffing issues at the Marian Living Center which was to open in June 1998. At that meeting, Hlebak and Padisak discussed the staff positions at the Center which were to be recognized as part of the existing bargaining unit, as well as those positions which were supervisory positions to be excluded from the unit. Specifically, Hlebak told Padisak that the Employer would establish afternoon and night supervisor positions at the assisted

living center which were not to be included in the bargaining unit. The Employer determined that it was a prerequisite for the afternoon and night supervisors to possess LPN licenses in order to establish a clinical presence at the facility on an around the clock basis. The record does not show that the Petitioner disagreed with the Employer at that time with regard to the exclusion of the afternoon and night supervisors from the bargaining unit.

The record further reveals that during the 1998 negotiations for the current collective-bargaining agreement, a strike occurred from October 22, 1998, through October 28, 1998. During this period, the afternoon and evening supervisors at the Center did not strike with bargaining unit employees. The record further shows that prior to the Petitioner's ratification of the collective-bargaining agreement on October 28, 1998, the Petitioner made no requests or proposals during negotiations to include the afternoon and night supervisor positions within the bargaining unit.²

As mentioned above, the Petitioner seeks to include the LPNs employed as afternoon and night supervisors at the Marian Living Center in the existing unit. For the reasons set forth below, I find that clarifying the certification of the existing bargaining unit is inappropriate at this time.

The Board set forth the standards for unit clarification in Robert Wood Johnson University, 328 NLRB No. 131, slip. op. at 3 (1999):

Unit clarification may be appropriate where an employee classification has been newly created or has undergone recent substantial changes so as to create doubt regarding whether that classification should be accreted to an

² The record did establish, however, that the Petitioner requested by letter dated October 13, 2000, that the Employer place LPN Supervisors Martha M. Bucherie, Cheryl A. Duncan and Barbara E. Kerten in the bargaining unit and deduct initiation fees and monthly dues. By letter dated October 20, 2000, the Employer denied the Petitioner's request, informing Petitioner that these individuals were supervisors who were excluded from the bargaining unit.

existing unit. But, unit clarification may not be used to add to a unit an employee classification which historically has been excluded from the unit. *Union Electric Co.*, 217 NLRB 666 (1975). Rather, a petition seeking to include a classification historically excluded raises a question concerning representation which can only be resolved through an election, or based on majority status. *Boston Cutting Die Co.*, 258 NLRB 771 (1981).

In analyzing accretion pursuant to a unit clarification proceeding, the Board has indicated that historical exclusion is the determinative factor in precluding the accretion.

As stated in United Parcel Service, 303 NLRB 326, 327 (1991) (emphasis added):

The limitations on accretion...require neither that the union have acquiesced in the historical exclusion of group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is that fact of historical exclusion that is determinative.* (Emphasis in original)

The Board has consistently followed a restrictive policy in finding accretion because such a finding forecloses employees' basic rights to select their bargaining representative. Towne Ford Sales and Town Imports, 270 NLRB 311 (1984). The Board stated that it will not, under the guise of accretion, compel a group of employees who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity to express their preference in an election. *Id.*

Applying these principles to the instant case, I find that the afternoon and night supervisor positions held by the LPNs at issue have been historically excluded from the bargaining unit and cannot be added by means of a unit clarification petition. In its brief, Petitioner argues that the instant petition seeks to clarify an ambiguity in the contract as to whether the LPN positions fall within the contract exclusion or inclusion. The record, however, shows that prior to the opening of the Marian Living Center in June 1998, the Employer and Petitioner discussed the exclusion of the afternoon and night supervisor

positions from the existing collective bargaining unit. The record reveals that the Employer expressed its desire to exclude those employees and at that time, the Petitioner acquiesced to the exclusion of such positions from the bargaining unit.

Under these circumstances, I find Kirkhill Rubber Company, 306 NLRB 559 (1992), relied on by the Petitioner, to be factually distinguishable from the instant matter. In that case, the Board clarified the certification of the unit during a certification year where the parties had not yet entered into a collective bargaining agreement. Unlike here, there was no history of excluding the classification from the unit.

In reaching this finding, I further note that during negotiations for the current collective-bargaining agreement, the Petitioner did not request or propose to include the afternoon or night supervisor positions in the existing unit. I find this particularly noteworthy because the afternoon and night supervisor positions were in existence prior to the execution of the current contract.³

I also find that the evidence does not establish any significant changes in the afternoon or night supervisor positions to justify accretion of the existing unit. The record establishes that the Employer has attempted to create a greater clinical presence at the Marian Living Center and, in that regard, the Employer has increased the number of LPNs at the facility from the time of its opening from four afternoon and night supervisors to the current total of five. Contrary to the Petitioner's assertion that a unit may be clarified mid-term where employees perform new operations, I find that the evidence does not establish any substantial change in duties for the afternoon or night

³ As such, Petitioner's citation to Bethlehem Steel Corporation, 329 NLRB No. 31 (1999) is distinguishable from the instant case. In that case the petition did not seek to modify the existing unit, but rather sought to have the Board determine the placement of classifications that did not come into existence until after the contract was executed.

supervisor from the time the afternoon and night supervisor positions were established in June 1998 to the present.

The Petitioner, citing Shop Rite Foods, 247 NLRB 883 (1980) and University of Dubuque, 289 NLRB 349 (1988), further asserts that its petition should be processed because the Board has entertained unit clarification petitions filed shortly before the expiration of the contract. In those cases however, the unit clarification petitions were filed either three months before the contract expired or three months before negotiations for a successor contract were to begin. The petition in the instant case was filed more than ten months prior to the expiration of the contract. Moreover, the record does not establish any set time period in which negotiations for a successor contract are to be initiated.

While the Board has refused to process unit clarification petitions where such petitions would be disruptive of voluntarily continued bargaining relationships, it has stated that it does so without prejudice to the filing of the petition at an appropriate time. Shop Rite Foods, *supra.* at 883; Wallace-Murray Corporation, Schwitzer Division, 192 NLRB 1090 (1971); Arthur C. Logan Memorial Hospital, 231 NLRB 778 (1977). The Board has found that, ordinarily, such unit clarification petitions are appropriately filed shortly before the expiration of the collective-bargaining agreement when the parties are preparing to negotiate a new contract. Under those circumstances, unit clarification may spare the parties an unnecessary labor dispute. Shop Rite Foods, *supra.* at 883.

Based on the foregoing, and the record as a whole, I shall order that the petition be dismissed because of the historical exclusion of the disputed employees from the unit and the fact that it was not timely filed.⁴

ORDER

IT IS HEREBY ORDERED that the petition in this case be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by February 22, 2001.

Dated at Cleveland, Ohio this 8th day of February 2001.

/s/ John Kollar

John Kollar
Acting Regional Director
National Labor Relations Board
Region 8

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⁴ I note that there is some discussion on the record regarding the supervisory status of the LPNs sought to be included. In light of my finding that the LPNs have been historically excluded from the bargaining unit, and that it is inappropriate to process the instant petition at this time because it was not timely filed, I find it unnecessary to pass on the issue of whether such LPNs are supervisors within the meaning of Section 2(11) of the Act.